# Supreme Court of the United States.

No. 156.

JOHN R. METSKER AND ELIZABETH, APPELLANTS,

*vs.*

GEORGE H. BONEBRAKE, ASSIGNEE OF JOHN R. METSKER, A BANKRUPT.

*Appeal from the Circuit Court of the United States for the District of Indiana.*

## BRIEF FOR APPELLANTS.

### STATEMENT.

Suit was instituted in the Circuit Court of the United States for the District of Indiana by George H. Bonebrake, as assignee of John R. Metsker, against John R. Metsker and Elizabeth Metsker, his wife, to set aside, as fraudulent, certain conveyances as in fraud of the then existing bankrupt law.

The allegations of the bill of complaint are that John R. Metsker was adjudged a bankrupt in the District Court of the United States, upon a voluntary petition in bankruptcy filed in said District Court on the 1st day of December,

1876; that he was, on the 2d day of August, 1876, within four months of the time of filing of such petition in bankruptcy, owner of a certain tract of land in Indiana; that he was then a member of the firm of Poe & Metsker, which was indebted in the sum of $5,000 in excess of its assets; that on August 2, 1876, the said John R. Metsker being the owner in his own right of said tract of land, and being indebted as aforesaid, with the fraudulent intention of defeating the operation of the bankrupt law, etc., did execute, without consideration, a deed for said land to one McCole, who executed a deed for said land to Elizabeth Metsker without consideration; that she participated in the fraud, and accepted the deed from McCole with full knowledge of its purpose and with the intention of carrying out such fraudulent intention. Prayer to set aside deed, etc.

It will be noted that the bill of complaint stands upon an attempted fraud of John R. Metsker, against the provisions of the bankrupt law, in which Elizabeth Metsker participated.

The matter was referred to Hon. Livingston Howland, master, to take the evidence, and report the finding thereon. We cannot better state the facts as found than by inserting the report of the master: (pp. 3 and 4 of Transcript.)

"To the Honorable Court.

"The undersigned, master, to whom was referred the above entitled matter, respectfully submits the following report:

"On the 2d day of August, 1876, John R. Metsker and wife conveyed the land described in the bill to Cyrus J. Cole, who, on the 4th of same month, reconveyed the same to the wife, Elizabeth Metsker, the defendant. At the time of these transfers the land belonged to John R. Metsker in fee simple.

"On the 1st day of December, 1876, one Poe, with whom John R. Metsker was in partnership in the hardware busi-

ness, filed his petition (voluntary) in bankruptcy, alleging that Metsker would not join him, and making him a party, and praying that he be adjudged a bankrupt.

"On the 29th of December, 1876, Metsker comes in, confesses bankruptcy, and is adjudged accordingly.

"The first thing to consider is whether the transaction is within the limit of time prescribed by section 5128 U. S. Revised Statutes, before bankruptcy, which renders it void as a preference. If this is regarded as a case of involuntary against the non-joining creditor, then, under the amendment of 1874, two months is the limit; but if we regard it voluntary on the part of the partner when he comes in and confesses, then he should not be regarded as commencing proceedings until he filed his papers, which would be more than four months after the conveyance. So that, regarding Metsker as either an involuntary or voluntary bankrupt, both the two months and the four months had expired since the making the deed; the first when he was proceeded against by his partner, the last when he came in and joined in the petition. As to him, I regard the proceeding as involuntary, and that the two months' limitation under the amendment of 1874 applies.

"Then the conveyance would stand unless it was void or voidable, independent of these provisions of the bankrupt act, as against creditors. The defendant, the evidence shows, married the bankrupt, Metsker, some thirteen years ago. During the last ten years her husband came into possession of moneys belonging to her, proceeds mostly of land inherited from her father, amounting in the aggregate to $5,600, as I figure it. She expressly testifies that he agreed to return it to her, and she always claimed he was her debtor to that amount. Under the evidence, I think there was no doubt she was a creditor at the time of the conveyance. I think the evidence shows that he was insolvent, also, at that time, though not that she knew it. I think the conveyance was made and accepted to prefer her to other creditors. Under the evidence as to the value of the land, which is conflicting, I can not find that his indebtedness to her was not a reasonable consideration for the conveyance of the land, or that there is such great disparity between the land and the debt it was conveyed to satisfy as to indicate bad faith and a purpose to defraud other creditors.

"On the whole evidence, my finding is that the allegations of the bill are not sustained, and that the conveyance to the wife is not to be avoided by the complainant, assignee.

"All of which is respectfully submitted.

"LIVINGSTON HOWLAND,
"S. Master."

To this report of the master the complainant filed his exceptions, as set out in Transcript, pages 4–5. The exceptions relate to the finding: (1) That John R. Metsker was an involuntary bankrupt, and the conveyance of August 2, 1876, was no longer subject to investigation, being barred by the provisions of the bankrupt law; (2) that Elizabeth Metsker was a creditor of her husband and had no knowledge of his insolvency; (3) that she was a creditor of her husband, and that the land conveyed was not of sufficient value to indicate a fraudulent intent; (4) that the allegations of the bill are not sustained, and that the conveyance to his wife is not to be avoided by the complaint; and (5) because on all the evidence and the bill the finding should have been for the complainant, and the report as made is contrary to law and not supported by the evidence.

These exceptions were sustained by the court, and John R. Metsker and Elizabeth Metsker, his wife, appealed to this court.

## ASSIGNMENT OF ERRORS.

1. The court erred in sustaining the exceptions of the appellee.

2. The court erred in rendering judgment against the appellant and for the appellee as it appears in transcript.

## ARGUMENT.

There is no controversy about the proceedings by which John R. Metsker was adjudged a bankrupt. The master's report that "on the 1st day of December, 1876, one Poe, with whom Metsker was in partnership in the hardware business, filed his petition (voluntary) in bankruptcy, alleging that Metsker would not join him, and making him a party, and praying that he be adjudged a bankrupt. On the 29th of December, 1876, Metsker comes in and confesses bankruptcy, and is adjudged accordingly." [The brief of the appellee already on file sets out these facts, and they are confessed and uncontroverted.]

The only controversy is, (I) as to the status of John R. Metsker as affected by the proceedings in bankruptcy. (II.) Whether Elizabeth Metsker, his wife, was a creditor of her husband, and had knowledge of his insolvency when the deed of August 4, 1876, was executed to her. And (III) whether the land was not of value sufficient to indicate the fraudulent intent in her husband.

I. Was the status of John R. Metsker, August 2, 1876, as affected by the proceedings in bankruptcy, such that the conveyance made by him and his wife to C. J. McCole, and the conveyance made on 4th of same month by C. J. McCole to Elizabeth Metsker, are no longer subject of investigation as being *prima facie* within the prohibitions of the bankrupt law? We think there can not be serious doubt upon this question.

Metsker and Poe were partners in business December 1, 1876. Poe filed his petition in bankruptcy, voluntary as to himself, and involuntary as to Metsker and the firm.

This proceeding was pending until December 29, 1876, when Metsker came in and confessed bankruptcy. He did not come in and join in the petition, but confessed.

If he, by confessing, should be held to have joined, this could not affect his status prior to that date. Up to December 29, 1876, the proceedings were inimical—involuntary.

If held to the status of a voluntary bankrupt, after his appearance, he will be largely without the time of four months. From August 2 to December 29 is nearly five months. If the proceedings continued as begun, as to him, an involuntary bankruptcy, the time is more than twice the limit of the statute, which in such case is two months.

It cannot be said that the proceedings related back to December 1st. That would lead to absurdity. By appearing and confessing he could not change the fact that for nearly a month he was a defendant in proceedings against him to have him declared a bankrupt. At the most, he might be held to have *then* made application. But this does violence to the *fact*. A defendant, in any case, may avoid a hearing upon a matter alleged against him, which he does not care to contest, by admitting the allegation. But this is not equivalent to a voluntary appearance in court, with a request that judgment be rendered against him.

Our conclusion, from this inquiry, is that John R. Metsker's act on August 2, 1876, could not be questioned as violating any provision of the bankrupt law.

If this is correct there is no necessity to discuss the other propositions. But we wish to show that in any view of the case the deeds must be upheld.

II. Was Elizabeth Metsker a creditor of her husband, John R. Metsker, and had she knowledge he was insolvent when the deed of August 2, 1876, was executed?

Was she a creditor? The evidence is in the transcript. It shows that she loaned moneys to her husband from time to time as they came to her. These sums as set out in her evidence (Trans., pp. 11-12) were as follows:

| Received. | Principal. | Interest. | Source. |
|---|---|---|---|
| 1867, | $122 | $65 80 | When married. |
| Feb., 1867, | 700 | 378 00 | From Davis and Hawkins. |
| About 1868, | 200 | 96 00 | Father's personal estate. |
| Dec., 1870, | 1,000 | 350 00 | A. Burris (brother.) |
| 1871, | 200 | 60 00 | Sale of land, (forfeit.) |
| May, 1872, | 3,000 | 765 00 | " " (Shryock.) |
| Feb., 1875, | 300 | 27 00 | Brother's estate. |
| Dec., 1875, | 200 | 11 00 | " " |
| | $5,722 | $1,752 80 | |

These moneys were loans, and were to be repaid. It is not clear when the loans were made, but presumably they were made soon after she received them, and interest calculation is made as if so made. Her evidence upon this is in the Transcript, p. 12, as follows:

"I loaned this money to my husband at different times; don't know how long I kept it; altogether I let him have $5,700. There was one time we had some trouble, and I wanted my money. He said he hadn't the money and would have to deed me his farm. This was a year and half before he did deed it to me; did not know why he did not deed it to me then. When he went into partnership with Poe, I told him he would have to pay me if he did so. Said he could not do it, but would deed me the farm. This was four or five months before the deed was made. I told him several times I wanted the money, and he always said he had nothing but the farm to give me; the last time about a week or two weeks before the deed was made. * * * The deed was made to me to pay the debt my husband owed me. There was no understanding that I was to deed back the land to him at any time. At the time I got the deed, I supposed my husband to be in good circumstances. I first heard he was embarrassed two or three weeks before they closed the grocery, late in the fall, (Dec. 1.) At the times I let my husband have money, I told him I would loan it to him, provided he would pay it back some day. He said he would pay it back."

This evidence, which is uncontradicted, would seem to settle the question as to whether she was a creditor, and

also whether she had knowledge that her husband was insolvent or embarrassed August 2, 1876.

III. Was the land of a value sufficient to indicate a fraudulent intent in her husband? To this we can, in view of the evidence upon the value of the land, confidently say there was nothing in the transaction to indicate anything of the sort.

It appears that Mr. Metsker obtained from his wife, at various times, in an aggregate, the sum of $5,722. Upon this there would have accumulated to August 2, 1876, about the sum of $1,752 of interest. Thus the debt August 2, 1876, was $7,474. August 2, 1876, the land was conveyed to McCole by Metsker, and by McCole August 4 it was conveyed to Mrs. Metsker. It was then worth from $35 to $40 per acre. There were 160 acres, and this would make from $5,600 to $6,400. As wife of Mr. Metsker she was entitled to one-third of his land in fee at his death. This is an inchoate interest; but is such an interest that he could not divest it, nor could the law take it from her in any way. She therefore received a present possession of the entire tract, to one-third of which she had an inchoate interest. In view of this, that payment by him was not excessive. Under the laws of Indiana this inchoate interest may be asserted and possession of the land obtained, after a judicial sale, against her husband.

It would appear, then, that she paid a full value for the land, if she stood in the relation of a stranger to John R. Metsker and had obtained the entire tract. Being his wife, and having this inchoate interest in the land, (which in a sale to a third party by judicial process would have immediately vested,) she paid a sum largely in excess of the value of the land she obtained. If title had remained in John R. Metsker, and the assignee had obtained the property, the one-third secured to the wife would have immediately passed to her; so that creditors could not have ob-

tained more than two-thirds of the land, and were not affected by the transfer beyond the amount of it.

Upon each point in controversy Mrs. Metsker has the advantage.

## Authorities Relied Upon.

Section 35 of the Consolidated Bankrupt Act, (section 5128 of original act as amended June 22, 1874, ch. 390, 18 Stats., 180,) provides that if a debtor, being insolvent, or in view of insolvency, shall convey any of his property with a view to give a preference to any creditor, and the person receiving such conveyance having reasonable cause to believe such person is insolvent, and knowing that such conveyance is made in fraud of the bankrupt law, such conveyance shall be void.

Clark *v.* Iselin, 21 Wall., p. 375 of opinion.

While involuntary proceedings in bankruptcy were pending against John R. Metsker, he could not make a voluntary application.

*In re* Stewart, 3 N. B. Register, 108.

Bump on Bankruptcy, (10th ed.,) p. 779, and Rule xviii, p. 882.

His appearance December 29, 1876, was, therefore, a confession, and had the effect simply of avoiding a hearing upon the allegations against him.

This court has "often declared that the construction given to a State statute by the highest judicial tribunal of such State, is to be accepted in the Federal courts as a part of the statute whenever they are required to determine questions or ascertain rights arising out of or dependent upon such local statute."

Christian Union *v.* Yount, 101 U. S., 357.

Township of Elmwood *v.* Marcy, 92 U. S., 289.

By the statute law of Indiana, existing long prior to the earliest credits given to her husband by Mr. Metsker, and by the decisions of the Supreme Court of Indiana depending upon such statute law, the property of a married woman received by her by gift, descent, or devise, becomes and remains her separate property.

The statute law of Indiana in relation to wife's separate property is set out and construed in *Scott* v. *Scott*, 13 Ind., 225.

"The rule of the common law [as to husband's right to wife's property] has been abrogated by legislative enactments.

"By sec. 5, 1 R. S., p. 321, it is enacted that 'No lands of any married woman shall be liable for the debts of her husband, but such lands and the profits therefrom shall be her separate property as fully as if she was unmarried; *Provided*, That such wife shall have no power to encumber or convey such lands, except by deed in which her husband shall join.'

"By sec. 5, Act 1853, p. 57, it is enacted that 'The personal property of the wife, held by her at the time of her marriage, or acquired during coverture, by descent, devise, or gift, shall remain her own property to the same extent and under the same rules as her real estate so remains.'

"From the foregoing statutory provisions it is apparent that the wife is fully entitled to the use, possession, and control of such personal property as is mentioned in the statute as fully as if she were unmarried, and this right exists not only as against the world at large, but equally as against her husband. If the husband, or the husband and wife jointly, were entitled to the possession and control of the property, how could the wife's right exist as fully as if she were unmarried? The statute makes such property her own separate property. In respect to such property she is entirely independent of her husband, and may possess, enjoy, control, and, in short, do anything with it which she pleases, except to dispose of it without her husband's consent. This is a decided innovation upon the principles of the common law, but we see no other construction that can be properly put upon the statutes in question. This construction is sustained by authority.

* * * "Whether these provisions of the statute are wise and salutary and calculated to promote the harmony of domestic life, preserve the sacredness of the marriage relation, and promote the real interests of those for whose benefit they were intended, are questions not for the determination of the courts. If experience shall prove them to be unwise and impolitic, the body only that enacted can repeal or modify them."

A married woman in 1865 loaned to her husband a sum of money belonging to herself. Afterwards said husband traded a stock of goods to a third person in part payment for a tract of land, the deed being taken in the name of the wife, who executed notes and a mortgage on the land for the residue of purchase money, said conveyance being procured to her and received by her in payment of the money so loaned by her to her husband. In an attachment proceeding by the husband's creditors it was held that in the absence of actual fraud the wife was to be regarded as a purchaser for a valuable consideration, and was entitled to hold the land, and that where it is sought to subject lands to the payment of debts because of a fraudulent conveyance, it must be shown that the grantee had notice of the fraudulent intent. (*Kyger* v. *The F. Hull Skirt Co.*, 34 Ind., 240.)

A wife sold her separate property and placed the proceeds in the hands of her husband under an agreement that he would improve his farm therewith, and afterwards he agreed to deed the farm to her for the debt. The husband failed to convey, and mortgaged the farm to secure a debt. On proceeding to foreclose, his wife was admitted as party defendant, and on her cross-complaint she was given decree for specific performance of agreement to convey. (*Hixon et al.* v. *Cuppy*, 33 Ind., 210.) To same effect in principle is *Barnett et al.* v. *Goings et al.*, 8 Blfd., 284.

Unless the wife's money came into husband's possession as his property by such acts as evinced an intention to di-

vest the wife's right or title, it does not become his absolutely, and she may follow it, or land purchased therewith; and this against creditors. (*Standeford et al.* v. *Devoe et al.*, 21 Ind., 405.)

When a man invests his wife's money in land, and, without her knowledge or consent, takes the deed therefor in his own name, and afterward sells such land, she is entitled to the entire sum received therefor. (*Dayton* v. *Fisher*, 34 Ind., 356.)

A father paid purchase money for a piece of land, intending conveyance to be made to a married daughter. The husband had deed made to him without knowledge or consent of wife. Afterwards, when he was in failing circumstances, the husband and wife conveyed to the father, and the father conveyed to his daughter. This deed was upheld. (*Summers et al.* v. *Hoover et al.*, 42 Ind., 153.)

To same effect, see—

Davis et ux *v.* Davis et al., 43 Ind., 561.
Watkins *v.* Jones, 28 Ind., 12.
Wilkins et al. *v.* Miller, 9 Ind., 100.
Carver *v.* Carver, 53 Ind., 241.
Sherman *v.* Hoagland, 54 Ind., 578.
Heaton *v.* White et al., No. 9361 Ind. Sup. Ct., present term.

A court of equity will hold the husband and his heirs trustees of his wife's separate property, if he take possession of it in any other way than by gift, express or implied. (*Resor* v. *Resor et al.*, 9 Ind., 347.)

Where a wife advances money to her husband, or the husband is indebted to the wife upon any valid consideration, the wife stands as the creditor of her husband; and if the conveyance is made to pay or secure such liability, the wife will hold the property free from the claims of other creditors, where the transaction is unaffected by unfairness or fraud. (*Sims et al.* v. *Rickets*, 35 Ind., 181.)

The grantee in a fraudulent conveyance, who has paid a valuable consideration, cannot be affected thereby, unless he had notice of the fraudulent purpose of the grantor.

The relinquishment by a wife of her inchoate interest in the lands of her husband is a sufficient consideration to support a conveyance to her of part of the lands of her husband, and such agreement is valid though not in writing. It is founded on a valuable consideration, and creates a moral obligation which the husband has the right to discharge. Debtor may waive the provisions of the statute of frauds, and execute the agreement although it may be within the statute. (*Brown et al* v. *Rawlings et al.*, 72 Ind., 505.)

By these authorities it abundantly appears that in Indiana a husband and wife may contract with each other with reference to her separate real and personal property as freely as may strangers.

These authorities also hold that a husband having obtained his wife's property must account for the same unless it appear that he obtained it as a gift.

See also Schouler on Husband and Wife, secs. 380–1, 395.

This court, in Doe *v.* Childress, 21 Wall., upheld rights obtained through an attaching creditor, the proceedings having been without the four months' limit and in accordance with the law of the State.

If Mrs. Metsker had not taken a conveyance of the land in discharge of the debt of her husband to her, she could have proven the debt against his estate.

"Money loaned by the wife of the bankrupt to him out of her separate estate is a claim that may be proved. While the law regards claims of this character with great distrust, equity will protect the rights of the wife even against the creditors of her husband. The court being satisfied that the money was the separate property of the wife and was placed in the husband's hands as a loan or trust for the benefit and use of the wife and not as a gift,

will adjudge him to be her debtor to that amount, and will award payment to her as any other creditor." (Citing *In re* Bigelow *et al.*, 2 B. R., 556; S. C., Bur., 198; *In re* Blandin, 5 B. R., 39; S. C., Lowell, 543; S. C., L. T B., 198; *in re* David W. Jones, 9 B. R., 56; S. C., 6 Biss., 68.)

Bump on Bankruptcy, 578.

A debtor may prefer one creditor to the exclusion of others. So applied to husband and wife.

Bump on Fraudulent Conveyances, (3d ed.,) pp. 183–4–5, 195–6, 223, 311–2, and citations.

Generally upon the case, see Bump on Fraudulent Conveyances, *supra*, and p. 503; secs. 20–21, p. 635, (Ind. Stat., 1 G. and H., 353.)

"It is settled law in Indiana that a pre-existing debt is a valuable consideration to support a conveyance."

Work *v.* Brayton, 5 Ind., 396.

Aiken *v.* Bruen, 21 Ind., 137.

A conveyance cannot be avoided under the bankrupt law or under the decisions of the courts of Indiana, as well as of all the other States, for fraudulent preferences, unless the grantee had knowledge of the fraud.

Vide Indiana Cases, *supra*.

Spaulding *v.* Myer, 64 Ind., 264.

Evans *v.* Nealis, 69 Ind., 148.

Ball *et al. v.* Barnett, admr., 39 Ind., 53.

See also Dickinson *v.* Adams, 17 Nat. Bank Reg., 380.

Clark *v.* Iselin, 21 Wall., *supra*.

That the inchoate interest of wife in husband's lands may enter into a consideration of transfer of real estate of husband to wife, and sustain it.

Brown et al. *v.* Rawlings et al., *supra*.

This inchoate interest is secured to her by statute, and set apart to her on a judicial sale of his property. Acts of Indiana Legislature 1875, p. 178. Cited and upheld in Jackman et al. *v.* Nowling, 69 Ind., 188.

The conveyance to or by an assignee is a *judicial* sale under this act.

McCracken *v.* Kuhn et al., 73 Ind., 149.
Ketcham *v* Schickentanz, 73 Ind., 137.
Roberts *v.* Shroyer, 68 Ind., 64.

The appellee has filed his brief, which is before us, and to which we wish to respond.

The appellee correctly states the dates of the conveyances and of the bankruptcy proceedings, viz., that December 1, 1876, Poe filed his voluntary petition in bankruptcy, and that December 29 Metsker appeared to this action. (Appellee's brief, p. 9.) We submit that after the proceedings *against* Metsker were instituted, he occupied the position of an involuntary bankrupt, and no action of his could change this. Certainly he could take no action *after* the petition was filed against him which would relate back and change his status to that of a voluntary bankrupt.

Appellee, without stating the evidence of witnesses, says there was difference of opinion as to the value of the land, and says it is fair to put the land at the value at which John R. Metsker took the land in the distribution of his father's estate. This value was fixed in a partition proceeding between the heirs, and is simply a relative value in comparison with other tracts taken by other heirs. It was not a purchase price.

The witnesses for the appellee put the land at an average value of about $8,000. The witnesses for the appellants put the land at an average value of about $5,600. These witnesses show a greater knowledge of the land and of its value than appears within the knowledge of witnesses of

appellants. The appellee quotes from a witness, Kenney, (Kinsey,) a statement said to have been made by Mr. Metsker, that he valued the land from $70 to $75 per acre. This, at most, was in mere commendation, and does not fix the value. Nor does it bind the appellant Elizabeth Metsker.

The appellee most unfairly cites the evidence of one Cardwell concerning conversation had with himself and Metsker, that "he had been expecting this (failure) and preparing for it for three months." This evidence was objected to at the time, and the master excluded it. (Transcript, p. 9) It was clearly incompetent against his wife, unless brought to her knowledge, and this was never pretended.

Appellee cites (pp. 3 and 4,) from the evidence of Mrs. Metsker taken before the master, an indifferent statement that before the notary (Cottingham) came (with the deed) she and her husband had not talked about the value or the price of the land. Her evidence in full shows that she had for a year and a half been urging him to pay her, and that he had then told her he would give her the land to pay his debt to her.

We think the appellee unfair in citing the evidence of Mrs. Metsker taken before the register before this action was begun (pp. 4, 5, 6). The evidence was taken in the hearing before the master. It was reduced to writing when taken, and could only be introduced on the hearing before the master to contradict her or impeach her evidence as thus given. It is cited in the brief as having the force of original evidence given on the hearing. All the statements of Mrs. Metsker cited by appellee as against her are abundantly explained in her evidence on the hearing, to which the appellee does not refer. She was not given an opportunity before the master to explain her evidence before the register. No reference was then made to that examination, as the transcript shows. But the evidence as given by Mrs.

Metsker in her examination before the register, taken altogether, conclusively shows that her money was loaned to her husband, and was always in the minds of each of them a debt to be paid. While we think it has no proper place in the transcript, not being a part of the evidence in this case, we do not think it, when taken in full, shows anything to the discredit of the transactions by which she became owner of the land in controversy.

The bill of complaint was not proven. It did not appear in evidence at the hearing before the master that the conveyances made August 2 and August 4, 1876, were made or received in fraud of the bankrupt law. The appellant, Elizabeth Metsker, showed a valid existing debt from John R. Metsker to her, and that the conveyance of this land was made in discharge of that debt. The statute law of Indiana, and the decisions of the Supreme Court of Indiana, warrant this payment of the debt. The report of the master was correct as to facts and as to the conclusions of law thereon, and the exceptions should have been overruled.

We respectfully ask this court to reverse.

SHELLABARGER & WILSON.
JOHN A. FINCH.

108-66

OFFICE SUPREME COURT U.S.
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# IN SUPREME COURT of the UNITED STATES.

JOHN R. MEDSKER AND WIFE,

*vs.*

GEORGE H. BONEBRAKE, ASSIGNEE IN BANKRUPTCY OF SAID MEDSKER.

## BRIEF FOR ASSIGNEE.

### I. STATEMENT.

John R. Medsker and Elizabeth Burroughs were married on August 3, 1865. Mr. Medsker's father had died before this marriage, leaving a large estate to be divided between his children. The division had not then been made, yet it was understood between them that John should have as his share a farm containing 162 acres, lying near Noblesville, Indiana. Almost immediately after the marriage John moved upon the farm (Rec., p. 12), and has resided thereon ever since.

On January 12, 1876, the Medsker heirs selected commissioners to partition the estate of their father between themselves (Rec., p. 20), and this farm was set apart to John at the price of $10,275 (Ex. D, Rec., p. 19), and the other heirs joined in a deed of conveyance to him (Ex. C, Rec., p. 18). From the time of the marriage John R. Medsker has been a farmer. In February, 1876, he engaged in mercantile business in Noblesville, as a partner with one Poe, under the firm name of Poe & Medsker. During the summer of 1876, the firm became embarrassed.

On August 2, 1876, Medsker and wife conveyed the farm by deed to his brother-in-law, Cyrus J. McCole (Ex. A, p. 16). McCole

testified: "I paid no consideration" (Rec., p. 7). Two days afterwards, viz., on August 4th, McCole and wife conveyed the farm to Elizabeth W., the wife of John R. (Ex. B, p. 17). McCole testified "she paid me nothing" (Rec., p. 7). Poe & Medsker failed, and closed their doors about November 20th (Poe's Ev., p. 8), owing over $5,000 firm debts, and each owing individual debts also.

On December 1, 1876, Poe filed his voluntary petition in bankruptcy, for himself and on behalf of the firm, making Medsker a party and asking that he also be adjudged a bankrupt. Medsker appeared voluntarily, and confessed his bankruptcy, and was so adjudged accordingly. George H. Bonebrake was appointed assignee, to whom was conveyed the property of the bankrupts.

On June 27, 1877, the assignee filed his bill in the United States Circuit Court at Indianapolis, against said Elizabeth and John R., to set aside the deeds mentioned above, as fraudulent against the husband's creditors (Rec., p. 1). The cause was referred to a Master (Rec., p. 1–2), who in time brought in a report, together with the evidence (Rec., p. 3).

His conclusions of law upon the evidence were that the deeds were made to discharge a debt of five or six thousand dollars that the husband owed the wife, and that while the conveyance was a preference, yet by lapse of time it was no longer subject to attack under Sec. 5128, U. S. R. Statutes.

The assignee filed exceptions to this report, and the case coming on for hearing upon the pleadings and evidence, the court sustained the exceptions and found that the deeds were frandulent and void, and wholly without consideration, as against the creditors of John R. Medsker, and directed that the farm should be sold for the payment of his debts (Rec., p. 5).

## II. The Evidence Shows that the Deeds are Fraudulent as Against the Assignee.

As we have seen, McCole paid nothing for the farm when it was conveyed to him, and received nothing when he conveyed it to Mrs. Medsker (McCole's test., p. 7). It follows that the deeds are fraudulent as against the creditors of the husband, unless it is established that the wife was a *bona fide* purchaser for value.

1. *Value of Farm.*—

Many witnesses testified as to the value of the farm. Some were of opinion that it was worth as much or more than the price fixed upon it by the commissioners, in making partition between the Medsker heirs, others less. Under these circumstances it is fair to accept the value at the price which John R. Medsker took the farm, viz., $10,275. (Rec., pp. 20–19–18, Ex. B. and C.)

John R. Medsker, after the partition was made, said he would not sell the farm for less than $70 to $75 per acre, and refused to entertain an offer of $60 per acre. In other words, he estimated the farm to be worth eleven or twelve thousand dollars. (Kenny's test., p. 16.)

2. *The Intent.*—

In 1875 Poe conveyed his property to his wife (Rec., p. 8). Medsker did the same in August, 1876. In November following, and about the time of the failure, one Cardwell asked Medsker why they had transferred their lands to their wives, "that it looked like a set up job," when Medsker answered, "He had been expecting this (failure) and preparing for it for three months." He said that "after finding that the business was in the shape it was he thought it best to do so." (Cardwell's test., p. 6.) The husband being then in possession of the farm, his declarations are competent evidence against the wife.

It needs no confession, however, to show the fraudulent intent. In the face of a failure, he and his wife convey the farm to a brother-in-law, who re-conveys to the wife. The transaction was abnormal. Each of these deeds expresses a consideration of $8,000, when nothing was paid. Henry A. Cottingham was the Notary. He went out to the farm on August 2, to get Mrs. Medsker's signature to the deed to McCole. The husband remained in Noblesville. His signature was not then upon the deed. (Mrs. Medsker's test., p. 14, and Ex. A, p. 16.)

Mrs. Medsker testified: "Before Cottingham came out I don't know that I had talked with my husband about what the farm—— or that any price had been agreed upon." (Rec., p. 15; Ex. A, p. 16.) "Mr. Cottingham read over the deed to me before I signed it. I saw it was a deed to McCole. I did not stop to inquire what it was for. * * * After Cottingham was out with the deed for

me to sign I had no conversation with my husband about the deeds." (Rec., p. 14.)

McCole testified. "I delivered the deed to her attorney" (Rec., p. 8). She testified that she did not get the deed from McCole; that she was not at the Recorder's office, and supposed her husband paid the fees for recording. The deeds were recorded on August 21 and 29 respectively. She says her husband brought her the deeds, and "I have kept both deeds together since." "It (the deed to her) has not been out of my possession since" (Rec. p. 14). It could not, therefore, have come to her possession until after the recording.

This imposed silence and indifferent confidence—this withholding deeds from record for a time, and engaging an attorney to act for the wife, with all the other facts, point to a knowledge, purpose and intent that can not be misunderstood.

3. *The Wife was not a Creditor.*—

In the face of these facts it is insisted that the wife was a creditor of her husband, and that the conveyance was a *bona fide* bargain and sale.

Mrs. Medsker was examined before the Register in Bankruptcy before the action was begun; and this examination is in evidence. At that time she disclaimed with emphasis that the transaction was a purchase. At that examination her counsel was present. In the course of it opposing counsel asked (Rec., p. 29):

"*Ques.* At the time you bought that farm"—

"*Witness* (interrupting). I did not buy the farm"—

"*Ques.* Did not you buy a farm from your husband?"

"*Ans.* No, sir."

Again:

"*Ques.* What did he [husband] say he was making the deed for?"

"*Ans.* To make me safe for what I let him have."

"*Ques.* State what he said was the reason of his making the deed at that time."

"*Ans.* He did not state any reason to me."

"*Ques.* Did you ask him to make the deed?"

"*Ans.* No, sir." (Rec., p. 25.)

Further on in the examination we find this (Rec., p. 30):

"*Ques.* Did you understand that your husband would have no right to that farm at all after that deed was made?"

"*Ans.* Not unless I was a mind to deed it back to him. He could not take it, unless I was a mind to deed it back to him, could he?"

It is not denied that the husband, from time to time, received moneys coming from the sale by him of lands devised to her. Appellants claim that he received these moneys as loans. The burden rests upon them to prove it. There is not much dispute about the facts; the contention is as to the proper conclusion of law. The facts are as follows:

Mrs. Medsker's father, Russell Burroughs, died testate a few months before her marriage, leaving her, under the sixth section of the will (Rec., p. 32), 120 acres of land and a small amount of personal property. This land was sold by the husband in two parcels

*First. The Hawkins and Davis tract.*

This tract, containing about twenty acres, was sold for $700 in February, 1867. In the examination before the Register, she testified that her husband made the sale; that he never told her, and she never knew whether the purchasers paid all cash, or part cash, and balance in notes; that no part of the purchase-money ever came to her possession, but that it was all paid directly to him.

*Second. The Bartholomew-Schryock tract.*

The remainder of the land was sold to one Bartholomew, in 1871. He seems to have paid $200 down, and, failing to complete the payments, reconveyed the land. She testified the $200 was not paid to her (Rec., p. 13). Before the Register Mrs. Medsker was asked:

"*Ques.* When the other land was conveyed to Bartholomew, do you know whether he paid you any money?"

"*Ans.* No, sir."

"*Ques.* When he reconveyed the land, to whom did he deed it; to you or your husband?"

"*Ans.* I don't know." (Rec., p. 22.)

Before the Master she testified that she had seen the deed recently, and the reconveyance was "to both of us—my husband and myself." (Rec., p. 15.)

This tract was then sold to Schryock, in 1872, for $3,000. She told the Master: "Schryock paid me none of the money; it was sold on time, I don't know terms, none of the notes were given to me; no part of the $3,000 was paid to me at any time." (Rec., p. 13.)

It seems that Schryock paid $700, by the conveyance of two lots in Noblesville, to the husband. (Rec., p. 15.)

Before her marriage she received $120.40 from her father's estate. Afterwards her husband was paid $204.98 on the same account. (Ex. J, p. 33.)

In 1870 she received $1,000, which is explained in the examination before the Register as coming from her mother's lands, which she told the Master was used in repairing the house on the farm in controversy. (Rec., p. 12.)

In brief, there came to the husband's hands:

| | | |
|---|---|---|
| 1. | Proceeds of sale of 20 acres in 1867 | $700 00 |
| 2. | Proceeds of share of mother's estate in 1870, used in rebuilding house | 1,000 00 |
| 3. | Proceeds of second tract sold (less lots at $700) | 2,500 00 |
| 4. | May 7, 1866, husband drew on distribution (Ex. J.) | 204 98 |
| 5. | Sundry sums from the estates of her brothers, aggregating in all about | 500 00 |
| | Total | $4,904 98 |

These sums were paid to and taken by the husband from time to time with her fullest knowledge and consent.

To the Master she said: "I took no note nor made no charge on my book against my husband on account of any of these sums of money." (Rec., p. 14.)

Before the Register:

"*Ques.* Was your husband in the habit of telling you about his money matters?"

"*Ans.* No, sir."

"*Ques.* Did he keep a book account with you?"

"*Ans.* No, sir."

"*Ques.* Did he ever have any kind of an account-book in which the account between you and your husband was set down in any sort of shape?"

"*Ans.* No, sir."

"*Ques.* Did you ever see such a memoranda, account-book, or paper?"

"*Ans.* No, sir."

"*Ques.* And all you know is that you had so much property, and your husband was allowed to sell it and take the proceeds?"

"*Ans.* Yes, sir; I allowed him to sell it." (Rec., p. 22.)

The income of the wife's land during the marriage, until sold, was taken by the husband, and no account kept. (Rec., p. 13.) These sums were received in the same manner as the money arising from the sales. Under the law of Indiana, the former were as much hers as the latter. As to the rents and income, no claim is made whatever; while, as to the latter sums, it is now insisted the husband was a borrower, and she a lender, although no note, account, or other evidence, was ever made. She told the Register:—"We had no time set for payment." (Rec, p 23.) She only mentions two conversations, during the whole period of their married life, concerning these matters. The *first* was at the time the first parcel was sold, in 1867, when she says her husband said he would "pay me back whatever the land would come to," (Rec., p. 23), and the *last* on the occasion of a quarrel, in 1875 (Rec., p. 26), when she says she told him she would like to have what he owed her, without mentioning any sum, and he said he could not pay it. "There was no more said until the deed was made." (Rec., p. 26.) After the deed was made the husband remained in possession of the farm. When she testified in her own behalf before the Master, in the spring of 1878, she said he was ditching the farm. "He pays for the ditching done now. His paid hands do the ditching." Rec., p. 14.)

Enough appears to show the true character of the whole case. The temptation to make colorable transfers to defraud creditors is so great that very satisfactory evidence is always required to uphold a conveyance from the husband to the wife.

In *Seitz* v. *Mitchell* (94 U. S. 582) it was said:

"Purchases of either real or personal property made by the wife of an insolvent debtor during coverture are justly regarded with suspicion, unless it clearly appears

that the consideration was paid out of her separate estate. Such is the community of interest between husband and wife; such purchases are so often made a cover for a debtor's property, are so frequently resorted to for the purpose of withdrawing his property from the reach of his creditors and preserving it for his own use, and they hold forth such temptations for fraud, that they require close scrutiny.

In a contest between the creditors of the husband and the wife there is, and there should be, a presumption against her which she must overcome by affirmative proof. Such has always been the rule of the common law; and the rule continues, though statutes have modified the doctrine that gave to the husband absolutely the personal property of the wife in possession, and the right to reduce into his possession and ownership all her choses in action. Authorities to this effect are very numerous."

In *Humes* v. *Scruggs*, (94 U. S. 22), it was said:

"If the money which a married woman might have had secured to her own use, is allowed to go into the business of her husbond, and be mixed with his property and is applied to the purchase of real estate for his advantage, or for the purpose of giving him credit in his business, and is thus used for a series of years, there being no specific agreement when the same is purchased that such real estate shall be the property of the wife, the same becomes the property of the husbond for the purpose of paying his debts. He can not retain it until bankruptcy occurs and then convey it to his wife. Such conveyance is in fraud of the just claims of the creditors of the husband."

See, also, *Wickes* v. *Clarke*, 8 Paige Ch., p. 163–4; *Reade* v. *Livingston*, 3 John. Ch., 481; *Savage* v. *Murphy*, 34 N. Y. 508; *Case* v. *Phelps*, 39 N. Y. 164; *Fox* v. *Moyer*, 54 N. Y. 125; *Jacobs* v. *Hesler*, 113 Mass. 160; *In re Jones*, 6 Bis. 68; *Moyer* v. *Adams, Assignee*, 9 Bis. 390; *Lyons* v. *R. R. Co.*, 42 Wis. 548.

In *Resor* v. *Resor*, 9 Ind. 347, it is said:

"Although the presumption is that money of the wife reduced to possession by the husband during the marriage becomes his, such presumption is not conclusive."

In *Johnson* v. *Rockwell*, 12 Ind. 80, it is said:

"Since the wife may appoint and dispose of her separate property as a *feme sole;* so she may give it to, or permit her husband to receive it, which will preclude her right, after his death, to charge his estate with what he so received."

It is a well recognized principle of law, that if a wife yields up to the husband, for his use, the proceeds of her separate estate, unaccompanied by a present promise on his part to refund or reimburse her, that this will not afford or constitute a valuable consideration, as against his creditors, for making years thereafter a settlement

upon the wife. *Phillips* v. *Frye*, 14 Allen, 36; *Lynn* v. *Bank of Ky.*, 5 J. J. Mar. 545; *Wylie* v. *Basil*, 4 Md. Ch. 327; *Nolen's Appeal*, 11 Harris (Pa.) 37.

"Claims of this kind should always be regarded with watchful suspicion, and when attempted to be asserted against creditors, upon evidence of the parties themselves, uncorroborated by other proof, they should be rejected at once, unless their statements are so full, clear and convincing as to make the fairness and justice of the claim manifest. Any other course will encourage fraud, and multiply the hazards of most business ventures." *Besson* v. *Eveland*, 26 N. J. Eq. 472; *Clark* v. *McGeihan*, 25 *Id.* 423.

Holding in mind these wholesome rules of jurisprudence, while viewing the combination of circumstances surrounding this transaction, no one can long hesitate to pronounce it fraudulent. The wife was not a creditor. The deed to her was not one of bargain and sale, resting on a fair and full consideration. The purpose was to hide and cover this property from the creditors of the husband, and withhold it, if possible, from anticipated bankruptcy.

It is hardly necessary to say, had the wife been a creditor, and the deed a *bona fide* transfer in liquidation of an honest debt, that the conveyance would be void as a preference.

Poe filed a voluntary petition on behalf of the firm and himself on December 1, 1876. On December 29th following, Medsker voluntarily appeared and confessed the bankruptcy. Can it be doubted that he was a voluntary bankrupt? The deed to the wife did not come to her possession until given to her by the husband after being recorded. The deed was recorded August 29, 1876. So that if lodging for record was delivery to her, and the appearance and adjudication as to Medsker, should be taken as the commencement of the proceedings as to him, yet the conveyance would be within the four months' limitation prescribed by statute. *Dutcher* v. *Wright*, 94 U. S. 553.

Section 4991 declares the filing of the petition shall be deemed the commencement of the proceedings. Poe filed the petition for the firm on December 1. Medsker voluntarily appeared, and ratified this action. Ratification relates to the time of the doing of the act. All the proceedings relate to the date of filing the petition.